WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2712/15R

BEFORE: G. Dee: Vice-Chair

HEARING: January 5, 2018 at Toronto
Written

DATE OF DECISION: February 6, 2018

NEUTRAL CITATION: 2018 ONWSIAT 437

DECISION(S) UNDER APPEAL: Reconsideration request regarding *Decision No. 2712/15* dated January 20, 2016

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Issues

[1] The worker seeks a reconsideration of *Decision No. 2712/15.*

[2] The decision found that the worker was capable of full-time work as a community health nurse or a tele-health nurse and as a result the worker was determined to have no Loss of Earnings (LOE) entitlement from October 1, 2004 and ongoing. The decision also found that the worker was not entitled to an increase in her Non-Economic Loss (NEL) award of 35% for a chronic pain disability (CPD).

[3] The worker's representative on the reconsideration request asserts that the Panel failed to consider whether the worker was only able to perform part-time work.

(ii) Reconsideration criteria

[4] The Appeals Tribunal has developed procedures to ensure that fair hearings take place. These rules make sure that workers and employers have a full opportunity to be heard. These rules also require that written reasons are provided for all of the final decisions that the Tribunal makes on appeals.

[5] Once a reasoned decision is issued by the Tribunal following a fair hearing it is expected that the Tribunal's decision is final. Under the law, workers and employers have no right to a further appeal from a final decision of the Tribunal.

[6] The Workplace Safety and Insurance Act does however provide that the Tribunal might reconsider a decision. This is not something that workers and employers have the right to demand from the Appeals Tribunal. Rather, section 129 of the Act provides the Tribunal with the discretion to reconsider a decision "if it considers it advisable to do so."

[7] The Tribunal has considered the question of when it might be advisable to reconsider a decision.

[8] In considering this question the Tribunal has taken into consideration:

- the fact that claims generally have a history of investigation and adjudication at the WSIB with opportunity for input by the parties even before they get to the Tribunal for a final decision;
- the resources spent by workers, employers and the Appeals Tribunal itself in having an appeal heard at the Tribunal;
- the time required to have an appeal determined by the Tribunal;
- the Tribunal's efforts through its policies and procedures to ensure that a fair hearing takes place; and
- the need to have certainty and finality in the decision making process.

[9] The Tribunal has concluded that its decisions should not be reconsidered on a routine basis. Instead, reconsiderations should only take place where it is shown that there has been a significant defect in the decision making process at the Tribunal.

[10] The need to show that there has been a significant defect in the decision making process at the Tribunal has been described as the "threshold test". The leading case on the threshold test is *Decision No. 871/02R2*. In that decision it was stated that:

> Any error and its resulting effects must be sufficiently significant to outweigh the importance of decisions being final and the prejudice to any party of the decision being re-opened.

[11] The Tribunal's reconsideration process was considered by the Divisional Court in Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal.[1] In that decision the Court found that a high threshold test is required in order to balance the interests of the Tribunal and other parties.

[12] The Tribunal has a Practice Direction on reconsiderations. The Practice Direction provides guidance about when the Tribunal will or will not allow a reconsideration request. The Practice Direction includes the following statements:

- A reconsideration will not be granted because a party disagrees with the decision and wants to re-argue the case.
- The Tribunal might decide that there is a good reason to reconsider a decision when:
    - significant new evidence is discovered which was not available at the original hearing and which would likely have changed the outcome
    - the decision overlooks an important piece of evidence (as opposed to rejecting the evidence or distinguishing it)
    - the decision contains a clear error of law (for example, the decision does not apply the relevant sections of the *Workplace Safety and Insurance Act*)
    - the decision contains a jurisdictional error (for example, the Tribunal decided an issue which it did not have the legal authority to decide).

(iii) Analysis

[13] During the worker's testimony at the initial hearing of this matter the worker asserted that she was totally disabled from work. The worker had also previously asserted that she is totally disabled in her dealing with the WSIB and with health care providers.

[14] The Panel in Decision No. 2712/15 did not accept that the worker was totally disabled based upon some of the medical reports in the appeal record but also based upon the worker's known level of physical activities. In paragraph 53 of its decision the Panel noted that:

> … it is hard to "square the circle" of the worker's daily activities, which are not insignificant, with her claim of total disability. …

[15] In his reconsideration submissions the worker's representative does not take issue with the Panel's determination that the worker is not totally disabled or that she is capable of work within the occupations that the Panel found the worker was performing work within. The reconsideration submissions instead assert that the Panel failed to consider whether the worker was only able to work part-time.

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[1] [2004] O.J. No.919 (Div.Ct).

[16] Having reviewed in detail *Decision No. 2712/15* and the reconsideration submissions made on behalf the worker I find that the threshold for allowing a reconsideration of the aspect of the Tribunal's decision that found the worker is capable of full-time post-injury work. I make this finding as the appeal record contains a significant amount of evidence that indicates that the worker has difficulties in maintaining activities due to difficulties with endurance and fatigue but the decision does not address this evidence in arriving at its conclusion that the worker is capable of full-time employment.

[17] In light of the issues involved in this reconsideration request I find that the matter is one that would be best determined following a new oral hearing in this matter. I may or may not be the Vice-Chair in that future hearing. I will therefore intentionally avoid reaching any determination about whether the worker could work full-time or is only capable of part-time employment. However, in the interests of providing an explanation for this reconsideration decision I will identify some of the evidence that indicates that the worker is having difficulty with fatigue and endurance, etc. and the reasons why I believe that this evidence was overlooked when the Panel reached its determination that the worker could work in full-time employment.

[18] The worker's participation in activities of daily living, household chores, child care, along with other personal matters such as driving was clearly a significant factor in the Panel finding that the worker was not totally disabled despite the opinion of the worker and some of her health care providers. The Panel also clearly took into consideration the worker's significant education and the sedentary nature of the work being proposed for her to perform. It is however, significant to note that none of the worker's daily activities as described in various paragraphs in the decision (primarily on page 7 of the decision) require activity levels on a constant or consistent 8 hour per day basis.

[19] In addition to the worker's testimony about her lack of stamina/endurance in activities there are many references in the medical reporting to limitations on the worker's stamina and her fatigue. Most significant in my view, given the reliance placed upon them in *Decision No. 2712/15*, is the evidence of limits on stamina/endurance contained in the October 10, 2007 report of Dr. R.E. Smith and the April 27, 2001 report of Dr. B. Schacter.

[20] Dr. Smith's report of October 10, 2007 was found by the Panel to be reliable and based upon a thorough and neutral assessment of the worker. Within that report, in a section of the report quoted by the Panel Dr. Smith notes the worker reported a sitting tolerance of 20 to 30 minutes. The report also noted about the doctor's examination of her dorsal spine that her staying power when reversing a mild kyphosis was poor and she had a tendency to collapse into kyphosis when fatigued. When talking about the worker's ability to perform exercise and postural correction that while the worker could definitely perform those with some coaching that "She of course cannot maintain them for very long because her endurance is poor".

[21] A number of quotes from Dr. Schacter's report of April 27, 2001 that indicate that the worker demonstrated effective physical capacity in some aspects of her examination are included at paragraph 47 of *Decision No. 2712/15*. The Panel's conclusion from this report is that "even at that early stage, about one year after the worker laid off from employment, notwithstanding her pain complaints, the worker was actually objectively less disabled than she believed to be the case". However, not quoted or referenced from this report is the doctor's own statement that "The situation here is quite significant in that this young woman is totally incapacitated and the

question now presents as to what to do with her". The decision does not attempt to reconcile this statement with the Panel's stated conclusion about the report.

[22] There are several other medical reports that also contain references to the limits of the worker's stamina. These include:

- A report from Dr. Tunks, Psychiatrist, dated November 27, 2001, who diagnosed the worker with chronic pain with diffuse soft tissue pain. The doctor reported that "It is closest to the so-called chronic fatigue syndrome, but is not dissimilar to chronic fibromyalgia. Apart from chronic pain/fatigue, there is no other Axis I or Axis II disorder at this point. The level of impairment associated with this is significant."
- A June 20, 2010 report from Dr. H.E. Chamberlain states that walking and standing are limited to brief intervals and that when the worker exceeds her limits she has increased symptomatology. The report also states that the worker is markedly restricted in mobility and endurance and that a return to work was extremely unlikely.
- A report from Dr. P. I. Marshall dated October 26, 2015 states:

  > At this time she is not able to be employed as there is no type of work that could accommodate her need for frequent rest periods of lying down as she is unable to sit or stand for even a four hour work period. Her standing tolerance is 5 – 10 minutes and sitting tolerance is 20-30 minutes. …

- A report from Dr. H. Seybold dated November 5, 2015 states:

  > She cannot stand or sit for prolonged periods of time (standing/walking 5 – 10 mins, sitting 20 mins) and requires frequent rest periods. Stamina, flexibility and strength is poor. If she overdoes it one day then she is in more pain and more fatigued the next. …
  >
  > Given the impact her condition has had on normal activities it is impossible to consider her being able to maintain gainful employment.

[23] There is on the other hand no medical opinion cited in the decision that states that the worker is capable of full-time employment.

[24] The Panel found that the known personal activities of the worker are inconsistent with a claim to be totally disabled. The Panel provided its reasons for that determination and that determination is not the subject of the reconsideration request. However, there are no personal activities of the worker referenced in *Decision No. 2712/15* that are of such a nature that the ability to perform such activities must be considered evidence of the worker's ability to perform work in full-time employment.

[25] In addition, there is a lack of any discussion of the part-time vs. full-time employability issue in *Decision No. 2712/15* that might explain how the Panel arrived at its conclusion that the worker is capable of full-time employment. In this regard I note that there is no discussion at all of the worker's ability to work full-time or part-time hours prior to the conclusion being reached in paragraph 71 of the decision that "While the worker without doubt has restrictions, we find that the worker still ought to be able to work full-time within those restrictions".

[26] While there is no specific discussion of the part-time vs. full-time issue in the decision there is a discussion and findings made with respect to the accepted restrictions for the worker. Those findings are contained in paragraph 79 of the decision which reads as follows:

> [79] Addressing the restrictions, the worker has non-organic pain. Thus it is difficult to delineate with precision her restrictions. Yet we accept that the standard back precautions and the prohibition on heavy work, or physically demanding work are appropriate and indeed, are sufficient.

[27] The Panel would appear to have found that standard low back precautions are all that the worker requires despite the fact that the worker's entitlement is not for an organic low back condition, it is for a chronic pain condition.

[28] The restrictions that the Panel found were sufficient for the worker did not include any consideration of the evidence indicating the worker's difficulties with endurance and fatigue that are recorded in the medical opinions of multiple treating physicians. If the Panel had good reason for not including consideration of these limitations that medical reports indicate are associated with the worker's condition, those reasons are not apparent in the body of the decision. I find that this is an error that warrants a reconsideration.

[29] I wish to reiterate that I have not made any binding factual findings about the worker's ability to work in part-time vs. full-time work. I have not had the opportunity to hear the worker's testimony or to question the worker. In this regard I note that the initial Panel in this matter was clearly concerned with the potential inconsistencies between the worker's actual level of activity and her claimed total disability. *Decision No. 2712/15* provides sufficient reasons in support of its finding that the worker is not totally disabled and is capable of performing the work that was identified for her by the WSIB. However, the decision does not sufficiently explain its conclusion that the worker is capable of full-time work and does not address multiple medical reports that indicate that the worker has significant difficulties with endurance and fatigue.

[30] I believe that it is desirable for an oral hearing to be held in this matter prior to a final disposition being reached on the issue of whether the worker is to be found capable of part-time vs. full-time work.

DISPOSITION

[31] The worker's request for a reconsideration of some aspects of *Decision No. 2712/15* is allowed.

[32] The determination in *Decision No. 2712/15* that the worker is not entitled to an increase in her NEL quantum is the final decision of the Appeals Tribunal.

[33] The determination contained in *Decision No. 2712/15* that the worker is capable of employment in the Suitable Employment or Business (SEB) of a community health nurse or a tele-health nurse is the final decision of the Appeals Tribunal.

[34] The determination contained in *Decision No. 2712/15* that the worker is capable of work within the accepted SEB on a full-time basis is rescinded. The issue of whether the worker is to be found capable of full-time or only part-time work within the SEB is to be decided following an oral hearing of this matter.

[35] I am not seized of this matter.

DATED: February 6, 2018

SIGNED: G. Dee